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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES HUGH FOREST,

Defendant and Appellant.

F057821

(Super. Ct. No. F07901479)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Kane, J., and Poochigian, J.

STATEMENT OF THE CASE

On October 23, 2007, appellant, James Hugh Forest, was charged in an information with second degree robbery (Pen. Code, § 211, subd. (a)(1), counts 1, 2, 3, 5 & 6)¹ and attempted second degree burglary (§§ 664 & 211, count 4). All six counts alleged appellant used a firearm within the meaning of section 12022.53, subdivision (b). Early in the proceedings, appellant was represented by attorney Ernest Kinney. Kinney last appeared as appellant's counsel on January 24, 2008.² Daniel K. Martin made two appearances on behalf of Mr. Kinney in March 2008. On May 22, 2008, Kinney was relieved as counsel of record and Michael G. Idiart briefly represented appellant.

On June 12, 2008, Eric G. Green was retained as appellant's counsel of record. The tentative time for trial was set for September 15, 2008, but postponed when Green successfully moved for a continuance on September 11, 2008. After more continuances, appellant's trial date was set for January 20, 2009. On January 20, 2009, the case was assigned to Judge Wayne Ellison for trial. Appellant and his codefendant were offered a plea bargain wherein they would receive prison sentences of 12 years. The appellant and his codefendant were given until the next day to reach a decision on the bargain.

On January 21, 2009, appellant executed a felony advisement, waiver of rights, and plea form in which he acknowledged and waived his constitutional rights pursuant to *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122 (*Boykin/Tahl*). Under the agreement, appellant would admit count one and the gun use enhancement. He would receive a prison term of 12 years and the remaining allegations would be dismissed. Attorney Green signed a statement that he reviewed the plea form with appellant, explained to appellant his rights, answered appellant's questions with regard to the plea, discussed the facts of the case with appellant, explained the

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

² Kinney became ill and subsequently died.

consequences of the plea, and reviewed the elements of the offenses and possible defenses with appellant.

The court reviewed the terms of the plea agreement with appellant and asked him if anyone promised him anything other than the bargain for 12 years in prison or if they threatened him. Appellant replied he had been threatened with 30 years in prison. The court explained that such a sentence was a possibility, but that he could also walk out the door. When the court asked appellant if he understood the consequences of his plea, appellant replied that he did.

The court asked appellant if his initials and signature appeared on the plea form. Appellant replied affirmatively. The court explained that the prosecutor was dismissing the other counts involving different victims but the prosecutor had the right to comment on the dismissed allegations and appellant would, along with his codefendant, pay restitution to the other victims. Appellant stated he understood this and wanted to proceed with the plea agreement.

Appellant indicated he understood his rights and did not need any more time to consult with his attorney. The court recounted appellant's *Boykin/Tahl* rights, which appellant orally waived. The court explained that appellant would receive a sentence of 12 years in prison, a fine, and up to 48 months on parole. The court explained other consequences of appellant's plea. The parties stipulated the police reports and preliminary hearing transcript constituted a factual basis for the plea. Appellant pled no contest to count one and admitted the personal use of a gun. The court granted the prosecutor's motion to dismiss the remaining allegations.

On February 27, 2009, appellant stated he wanted to file a motion to withdraw his plea. Green would not prepare such a motion. Because Green was retained counsel, appellant fired him. On March 5, 2009, attorney Alan DeOcampo was appointed to represent appellant. On April 17, 2009, appellant filed a motion to withdraw his plea which included a declaration of his reasons for doing so.

On April 24, 2009, the trial court heard and denied appellant's motion to withdraw his plea. On May 15, 2009, the trial court sentenced appellant to prison for 2 years on count one and to a consecutive term of 10 years for the gun use enhancement for a total prison term of 12 years. Appellant obtained a certificate of probable cause and filed a timely notice of appeal. Appellant contends the trial court erred in denying his motion to withdraw his plea on the ground that his trial counsel was ineffective.³

MOTION TO WITHDRAW PLEA

Appellant's declaration to withdraw his plea stated that Green only visited him in jail three times prior to January 21, 2009. Appellant asserted Green never discussed the police reports or informed him of the defense strategy. Green declined appellant's request for DNA testing of the gun saying, according to appellant, it would take too much time. Appellant claimed Green failed to investigate alibi witnesses that were provided to him and spoke to appellant in a loud and aggressive manner about accepting the plea bargain. Appellant stated he felt threatened when Green advised him he would receive a sentence of 30 years in prison if he went to trial.

Appellant said Green told him that if he was the only African American guy with dreadlocks at trial, a blind person would be able to point him out. Appellant asserted Green asked him what was wrong with him because he would not see his niece again until he was 50 years old. Appellant felt Green was unprepared for trial and would not zealously represent him. Appellant also felt coerced into accepting the plea agreement by what and how Green said things to him. Appellant said he felt he had no other choice than to accept the plea agreement even though he wanted to go to trial.

At the hearing on appellant's motion to withdraw his plea, Green testified he visited appellant enough times to prepare for the trial. Green said this was a few times but could not recall the exact number of visits with appellant. The visits lasted between

³ Because the appellant has limited the issue on appeal to the effectiveness of his counsel's representation, we do not review the underlying facts of his offenses but focus our factual review to the hearing on appellant's motion to withdraw his plea.

10 and 30 minutes. Green explained that appellant had a copy of all of the police reports and preliminary hearing transcripts. Green went over the case with appellant.

Green did not read the police reports or preliminary hearing transcripts with appellant. Green described appellant as “a very articulate young man” and Green assumed he was able to read the documents. Green went over the case and discussed potential defenses with appellant each time that he saw him. Green also reviewed the facts of the case with appellant and had his investigator show appellant a videotape generated at the site of one of the robberies. Green’s investigator interviewed appellant.

Green did not recall appellant making any specific requests of him such as taking a DNA test of the evidence. When asked if appellant provided him with alibi witnesses, Green replied, “He did not.” Green did meet with appellant’s mother, father, and sister. Green did not remember whether family members provided him or his investigator with a list of witness names.

Green told appellant that he was ready to go to trial. When Green visited appellant in jail, Green told appellant there was a standing offer from the prosecutor of a stipulated term of 15 years in prison. Appellant was not interested in that deal. Green did not file a trial brief, although one was filed by the attorney for the codefendant. Green explained it was not his custom to file written trial briefs or written motions in limine. Green stated that he was prepared to go to trial in appellant’s case, and that included preparation to argue in limine motions.

Green explained that the standing offer from the prosecutor had always been 15 years for appellant and 12 years for the codefendant. The codefendant always wanted to plead. Appellant did not want to plead. During a discussion in chambers, the prosecutor agreed to a bargain in which appellant would receive a sentence of 12 years. Appellant was potentially looking at much longer prison term in the neighborhood of 30 years if he received consecutive sentences.

Green discussed the offer with appellant and urged him to accept it because the tactical situation of the trial had changed. Green thought it was an identification case.

The codefendant is also appellant's cousin and they look very similar. They both have similar skin color and wear dreadlocks.

One victim had identified appellant in a photo lineup and at the preliminary hearing. The codefendant in the last two counts had been identified as the person using the gun. Green thought he had an opportunity to argue to a jury that the witnesses were confused as to identity and he could argue that it was the codefendant who committed the crimes. This argument would be more difficult with only appellant sitting at the counsel table once his cousin entered into a plea agreement. It would be easier for the witnesses to point to appellant as the perpetrator. For this reason, Green felt it would be in appellant's best interest to accept the plea agreement.

When asked about appellant's response to Green urging him to accept the plea agreement, Green explained there was not a lot of discussion. Appellant was reluctant at first to accept the offer, but talked to his mother or father by cell phone. After some more discussion, appellant decided to accept the plea offer. Green denied talking to appellant in a loud manner and said he did not think he changed his tone of voice "one bit."

Green further explained that he was not standing over appellant but was sitting next to him. Green was not yelling, ranting, or raving at appellant. Green acknowledged telling appellant he was "the only black guy [in court] with dreadlocks and a blind guy would be able to point [him] out." In making this comment to appellant, Green's tone was conversational. Green could not remember telling appellant that he would not see his niece until appellant was 50 years old or precisely what he said to appellant. Green did recall encouraging appellant to take the plea because in his legal judgment Green thought it was in appellant's best interest.

Green said he talked to appellant and so did both of appellant's parents. During appellant's conversations with his parents, Green was sitting in chambers drinking a cup of coffee. It was then that appellant decided to accept the plea. Green was not in the courtroom harping on appellant to accept the plea bargain. Appellant talked to his parents for between one and two hours. Appellant's parents did not accuse Green of

trying to coerce appellant into accepting the plea. Green absolutely felt prepared to proceed to trial.

At the time of the hearing, Green had been an attorney for 32 years. Green worked for the district attorney for nine years. He spent the remainder of his career as a criminal defense attorney. Green is death penalty qualified in multiple counties and has handled in excess of 1,000 cases.

Although Green was not appellant's counsel during the preliminary hearing, he was familiar with the facts of the case and knew there was a significant identity issue because as to one of three separate robberies, one witness misidentified appellant. Green believed that appellant was present but did not hold a gun during the other two robberies. If appellant lost at trial, he was looking at substantially more time in prison. Green did not bully appellant into a decision concerning the plea agreement.

The court found from both its own recollection of Green's representation as well as Green's testimony that appellant's declaration "is not based on any reasonable facts and not true, quite frankly." The court noted that in taking appellant's change of plea, it asked appellant whether any one threatened him in any way to give up his rights. Appellant replied that no one threatened him and he wished to proceed with the plea agreement. The court denied appellant's motion to withdraw his plea.

DISCUSSION

Appellant argues he presented credible evidence that he believed trial counsel was unprepared to proceed with a trial because he did not have appellant's list of alibi witnesses and counsel only saw him a few times in jail. Appellant asserts there was no evidence Green was prepared to go to trial and the record supports appellant's claims that he was verbally coerced into entering his plea by speaking to him in a loud and aggressive manner. Appellant states that during the preliminary hearing witnesses were confused and had difficulty making identifications of appellant. Appellant contends his affidavit constituted sufficient evidence that he was denied effective assistance of counsel and that the trial court abused its discretion in denying his motion to withdraw his plea.

We find appellant failed to show coercion or intimidation by clear and convincing evidence and has not demonstrated ineffective assistance of counsel.

A defendant seeking to withdraw a guilty plea must do so before judgment upon showing good cause. (§ 1018; *People v. Weaver* (2004) 118 Cal.App.4th 131, 145.) To show good cause, the defendant must demonstrate he or she was operating under mistake, ignorance, or any other factor overcoming the defendant's exercise of his or her free judgment. Other relevant factors showing that a defendant's free judgment has been overcome include inadvertence, fraud or duress. The defendant has the burden to present clear and convincing evidence that the ends of justice would be served by permitting a change of plea to not guilty. On appeal, the trial court's decision will be upheld unless there is a clear showing of abuse of discretion. (*Id.* at p. 145-146; *People v. Shaw* (1998) 64 Cal.App.4th 492, 496.)

Appellant's argument essentially ignores the trial court's findings that his declaration lacked credibility, or was not true, and Green's testimony was credible. Green testified he met appellant in jail, was prepared to go to trial, did not intimidate appellant verbally or comport himself in a menacing manner, and could not recall being given a list of alibi witnesses. The trial court did not believe the allegations in appellant's declaration that Green coerced or intimidated appellant into entering into the plea agreement and Green was given a list of alibi witnesses. The court also necessarily rejected appellant's contentions that Green was not prepared for trial.

The trial court did not make a single finding that any of appellant's statements in his declaration were true. Appellant is asking this court to assume, based on facts and contentions rejected by the trial court, that Green's preparation for trial was inadequate. We decline to do so. (See *People v. Markabali* (1993) 14 Cal.App.4th 847, 853.)

We further note appellant had, according to Green's testimony, substantial discussions with Green and his parents prior to accepting the plea agreement. Appellant was given the plea offer, an offer that removed three years from the prosecutor's previous plea offers, the day before he changed his plea. Appellant was not rushed into a decision

but given time to deliberate his choices. Appellant told the court during the change of plea hearing that he was not coerced into accepting the plea agreement. Under these circumstances, we find no abuse of the trial court's discretion in denying appellant's motion.

The defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not deemed reversible. Counsel's decision making is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or, unless there simply could be no satisfactory explanation. Prejudice must be affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

Appellant has failed to show Green's performance was below the objective standard of professional reasonableness. The trial court accepted Green's testimony that he was prepared to proceed with a trial. Green weighed the fact that at least one witness misidentified appellant at the preliminary hearing against the fact appellant would be tried alone without the codefendant making it easier for witnesses to identify appellant in court. Another witness had identified appellant at a photo lineup and the preliminary hearing. There was apparently a videotape of appellant committing one of the robberies. Green, who had 32 years of experience as a prosecutor and criminal defense attorney, also weighed appellant's total prison exposure of some 30 years should he be convicted of all of the counts and allegations against a plea agreement of 12 years. Green was

clearly aware of his tactical options. Green is a very experienced criminal defense attorney and carefully evaluated his tactical options and the plea offer.

Green's decision making, evaluated in the context of the available facts, was clearly within the range of reasonable representation. Appellant has failed to show counsel's performance was deficient.

DISPOSITION

The judgment is affirmed.